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In The
Supreme Court of the United States

OCTOBER TERM, 1981

PEOPLE OF THE STATE OF NEW YORK, PETITIONER

v.

WAYNE T. NELSON

**PETITION FOR WRIT OF CERTIORARI TO
THE STATE OF NEW YORK COURT OF APPEALS**

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To the Honorable, Chief Justice and Associate Justices of the
Supreme Court of the United States:

People of the State of New York, the Petitioner herein, pray
that a writ of certiorari issue to review the remittur, Appendix
at Page A2, which is the Order of the State of New York Court
of Appeals entered in the above entitled case of *People v.*
Wayne T. Nelson in the Office of the Albany County Clerk on
October 7, 1982.

QUESTIONS PRESENTED

Does the decision of the New York State Court of Appeals, *People v. Nelson*, violate the Fourth Amendment of the United States Constitution?

Does the decision of the New York State Court of Appeals, *People v. Nelson*, violate the Ninth and Fourteenth Amendments of the United States Constitution and the right of citizenry thereunder to personal safety by preventing police from asking questions of suspicious persons in public?

PARTIES

The People of the State of New York and Wayne T. Nelson are the only parties herein.

**In The
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No.

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OPINIONS BELOW

The decision of the State of New York Court of Appeals, of October 7, 1982, in ____ NY2d ____, is attached hereto in the Appendix at page A1 and that court's remittur is at A2. The opinion of the New York State Appellate Division of the Supreme Court, Third Department, decided July 16, 1981 is in 83 AD2d 689 and is in the Appendix herein at pages A4-A6. The decision of Albany County Court Judge John J. Clyne, dated November 12, 1979, is in the Appendix at pages A7-A8.

JURISDICTION

The decision of the State of New York Court of Appeals was made on October 7, 1982 and the order with respect thereto, which is called a remittitur, was entered in the Office of the Albany County Clerk on October 7, 1982, and is in the Appendix at A2. The jurisdiction of the Supreme Court is invoked under Title 28 U.S.C.A. §1257[3] on the grounds that the State of New York Court of Appeals decision in *People v. Nelson* violates the Fourth, Ninth and Fourteenth Amendments of the United States Constitution.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provisions involved are the: Fourth Amendment of the United States Constitution, which provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." The Ninth Amendment of the United States Constitution, which provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Fourteenth Amendment, Section 1 of the United States Constitution which provides: "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF MATERIAL FACTS

At approximately 8:00 p.m. on March 21, 1979, New York State Police Officer Michael Guiry was patrolling in his police vehicle when he noticed the respondent walking in a northerly direction on Morningside Drive in the Town of Guilderland, County of Albany, State of New York. The area in which the respondent was walking was strictly residential. There were no streetlights in the area and visibility was difficult. Upon observing the respondent, Officer Guiry noticed that there were bulges on both sides of his jacket underneath his arms and that he was walking in a "hunched" position. His suspicion aroused, Officer Guiry put on his vehicle's high beams and shone his spotlight onto the ground in such a manner as to throw some light onto the respondent. Officer Guiry then said to the respondent "Hi, how are you?" and "What is your name?" The respondent stopped, gave his name, and looked up and down the street. Officer Guiry exited his vehicle, asked the respondent for identification, and shone his flashlight upon the respondent. At that time Officer Guiry observed a large plastic bag containing a green vegetable substance protruding from the respondent's left chest pocket. At a Suppression Hearing, defendant acknowledged that the green vegetable substance was marihuana and that he knew Officer Guiry was a State Police Trooper when he first saw him. Officer Guiry ordered the respondent to empty his pocket. When the respondent refused to do so Officer Guiry advised him that he was under arrest and, after a small struggle, the respondent was handcuffed and searched. Various items were seized from the respondent's person and in a subsequent search conducted at the police station additional items were seized.

The respondent on May 22, 1979, made a motion to suppress the items seized from him on the ground that police had no probable cause to justify their stopping him. On September 28 and November 5, 1979, the Hon. John J. Clyne, Albany County Court Judge, conducted a suppression hearing. In a decision dated November 12, 1979, Judge Clyne denied the respondent's suppression motion, concluding that Officer Guiry "was justified in making the initial inquiry and upon observing a bag containing green vegetation protruding from defendant's pocket was justified in requesting defendant empty his pockets". Subsequently, the respondent pled guilty to the crime of criminal possession of a controlled substance in the third degree and received as sentence a maximum term of life imprisonment with a minimum period of imprisonment of five years.

On July 16, 1981 the New York State Appellate Division of the Supreme Court, Third Department, affirmed the respondent's conviction without opinion, the Hon. Ann T. Mikoll dissenting. On October 7, 1982, the New York State Court of Appeals reversed the order of the Appellate Division, vacated the respondent's conviction and plea, and granted the respondent's suppression motion "for reasons stated in the dissenting memorandum of Justice Ann T. Mikoll at the Appellate Division."

POINT I

The decision of the New York State Court of Appeals, *People v. Nelson*, violates the Fourth Amendment of the United States Constitution.

A. *The Decision of the New York State Court of Appeals, People v. Nelson, was Based Upon an Interpretation of the Fourth Amendment of the United States Constitution.*

The Court of Appeals reversed the order of the Appellate Division "for reasons stated in the dissenting memorandum of Justice Ann T. Mikoll at the Appellate Division". In her dissent while Judge Mikoll did not expressly state that her opinion was based upon an interpretation of the Fourth Amendment of the United States Constitution, or whether it was based upon New York State Constitutional Law obviously, it was solely based on the Fourth Amendment of the United States Constitution; Judge Mikoll cited three cases in her opinion, *People v. Corrado*, 22 NY2d 308, *People v. DeBour*, 40 NY2d 210, and *People v. Howard*, 50 NYS2d 583, all of which dealt with Federal Constitutional principles. Section 12 of Article I of the New York State Constitution is worded identically with the Fourth Amendment of the United States Constitution, and the former has never been interpreted as providing greater protections than the latter. In *People v. Belton*, 55 NY2d 49, the Court of Appeals noted that it had power to interpret Section 12 of Article I of the New York State Constitution as providing greater protections than the Fourth Amendment of the United States Constitution, but it declined to do so at that time and since that time. Because the New York State Court of Appeals

¹In *People v. Belton*, 50 NY2d 447, the New York State Court of Appeals held that where a police officer stopped a vehicle for speeding and, upon approaching the vehicle, smelled marijuana and observed marijuana in the vehicle, it was a violation of Belton's rights under the Fourth Amendment of the United States Constitution for the officer to make a warrantless search of the pockets of Belton's jacket, which was left lying on the back seat of the vehicle. This court reversed in *New York v. Belton*, 453 US454.

has never in the past expanded upon the protections provided by the Fourth Amendment of the United States Constitution, and did not take the opportunity to do so in the case at bar, it is clear that the decision in the present case was based upon an interpretation of the Fourth Amendment of the United States Constitution.

B. *The Decision of the New York State Court of Appeals, People v. Nelson, Improperly Interprets the Fourth Amendment of the United States Constitution.*

1. *Officer Guiry's asking the respondent for identification did not constitute a seizure within the meaning of the Fourth Amendment of the United States Constitution.*

In *Terry v. Ohio*, 392 US 1, this Court stated at page 19, footnote 16, that "... not all personal intercourse between police and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred". As stated in *United States v. Mendenhall*, 446, US 544, 553-54:

"The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals'. *United States v. Martinez-Fuerte*, 428 US 543, 554, 49 L.Ed.2d 1116, 96 Supreme Court 3074. As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification".

Herein it is clear that Officer Guiry did not "seize" the respondent by merely asking him for identification. Prior to observing a bag of green vegetation that the respondent himself admitted was marijuana, Officer Guiry neither displayed a

weapon nor physically touched the respondent. There is no indication in the record that Officer Guiry's tone of voice was such that compliance with his request might be compelled. In sum, there was simply no basis for the Court of Appeals to conclude that the respondent was "seized" when Officer Guiry asked him for identification.

2. *Even if Officer Guiry's request for identification did effect a "seizure", the respondent's Fourth Amendment rights were not violated since Officer Guiry had reasonable suspicion that the respondent was engaging in criminal activity.*

In determining whether an investigative stop violates the Fourth Amendment, this Court "has emphasized [i] the public interest served by the seizure, [ii] the nature and scope of the intrusion, and [iii] the objective facts upon which the law enforcement officer relied in light of his knowledge and expertise" (*United States v. Mendenhall*, 446 US 544 at 561 [concurring opinion of Mr. Justice Powell]). Examining the present case in light of those considerations clearly displays that any "seizure" herein was reasonable. First, the public's interest in the safety of their persons as well as their homes is greatly served when a police officer briefly and unobtrusively requests identification from a person seen walking at night on a dark street in a strictly residential area. For a police officer to pass by such a person would be a shirking of his duties. Second, it is clear that Officer Guiry's simple request for identification was a truly minimal intrusion. In *United States v. Mendenhall*, *supra*, Mr. Justice Powell stated in his concurring opinion at pages 562-563:

"The intrusion in this case was quite modest. Two plain-clothes agents approached the respondent as she walked through a public area. The respondent was near airline employees from whom she could have sought aid had she been accosted by strangers. The agents identified themselves and asked to see some identification. One

officer asked respondent why her airline ticket and her driver's license bore different names. The agent also inquired how long the respondent had been in California. Unlike the petitioner in *Terry*, supra, at 7, 20 L.Ed.2d 889, 88 S Ct 1868, 44 Ohio Ops 2d 383, the respondent was not physically restrained. The agents did not display weapons. The questioning was brief. In these circumstances, the respondent could not reasonably have felt frightened or isolated from assistance."

The intrusion in the case at bar was at least as modest as that in *Mendenhall*. Third, the fact that the respondent was walking through a residential area at night in a "hunched" position with "bulges" under his arms clearly would warrant a man of reasonable caution to believe that the respondent had engaged or was about to engage in criminal activity. As this Court stated in *Brown v. Texas*, 443 US at 52, n 2: "a trained, experienced police officer [may be] able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer". Although Officer Guiry's observations of the respondent probably would not have justified a full-blown search, no such intrusion was made herein until after Officer Guiry observed marijuana protruding from the respondent's pockets, at which time probable cause for an extensive search clearly existed. Thus, it is respectfully submitted that even if Officer Guiry's request of identification did effect a "seizure", the respondent's Fourth Amendment rights were not violated since Officer Guiry had reasonable suspicion that the respondent was engaging in criminal activity.

POINT II

***People v. Nelson* violates the Ninth and Fourteenth Amendments of the United States Constitution and the right of citizenry thereunder to personal safety, and should be held unconstitutional.**

The criminal conviction herein is Third Degree Criminal Possession of a Controlled Substance in violation of New York State Penal Law Section 220.16(9) for the possession as stated in the Indictment of "five milligrams or more of Lysergic Acid Diethylamide"; this was an A-III felony for which defendant received a maximum sentence of life with a minimum period of imprisonment of five (5) years. While this conviction, which was reversed by the New York State Court of Appeals, is of some importance, the impact of the decision itself upon law enforcement agencies in New York and the resulting personal safety of the citizens of New York State is of paramount importance. All police in New York State receive a manual which includes holdings of cases relating to their police duties. The decision herein by the Court of Appeals will guide police in New York State in their daily duties of detecting crime and enforcing the criminal laws of the State of New York.

It seems obvious that Police Officer Guiry had a duty to inquire, because of the defendant's suspicious actions and it would also seem he had a further duty to thereafter arrest defendant. The decision in *People v. Nelson* will undoubtedly govern police in New York State on their daily patrols where they see suspicious activities which a reasonable person would investigate. Crimes which police inquiry would often frustrate will undoubtedly occur resulting in injury to citizens in New York State.

The Ninth Amendment of the United States Constitution provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the People." The purpose of this Amendment is to guarantee to the People those rights inherent to citizenship in a Democracy which are not specifically enumerated in the Bill of Rights. *Griswold v. Connecticut*, 381 US 479, 488-89, 490-91 (1965) (Goldberg, J., Concurring). *United States v. Cook*, 311 F. Supp. 618 (D.C. Pa., 1970). It is respectfully submitted that this Amendment is broad enough in scope to encompass a right to personal safety on behalf of the People of the State of New York.

Justice Goldberg, with whom Justice Brennan and the then Chief Justice Warren joined, discussed the Ninth Amendment at length in his concurring opinion in *Griswold v. Connecticut*, 381 US 479 (1965). Justice Goldberg first emphasized at 488-89:

The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments

[The Amendment] was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected.

Continuing, Justice Goldberg explained at 490-91:

While this Court has had little occasion to interpret the Ninth Amendment, '[i]t cannot be presumed that any clause in the constitution is intended to be without effect.' *Marbury v. Madison*, 1 Cranch 137, 174, 2 L.Ed. 60, 72. In interpreting the Constitution, 'real effect should be given to all the words it uses.' *Myers v. United States*, 272 US 52, 151, 71 L.Ed. 160, 180, 47 S.Ct. 21.

The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and give it no effect whatever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment. . . .

Justice Goldberg added at 493-94:

In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the "traditional and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 US 97, . . . The inquiry is whether a right involved is "of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' . . ." *Powell v. Alabama*, 287 US 45 . . . "Liberty" also "gains content from the emanations of . . . specific [constitutional] guarantees" and "from experience with the requirements of a free society." *Poe v. Ullman*, 367 US 497 . . . (dissenting opinion of Mr. Justice Douglas).

Relying in part upon this lengthy discussion of the importance of the Ninth Amendment by Justice Goldberg, a majority of this Court in *Roe v. Wade*, 410 US 113, 153 that: "This right of privacy, whether it be founded in the Fourteenth Amendments concept of personal liberty and restrictions upon state action, as we feel it is, or as the District Court determined,

in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether to determine her pregnancy." This recognizes that people, and not only states, have rights under the Ninth Amendment.

The People respectfully offer that because *People v. Nelson* contravenes the Ninth and Fourteenth Amendment rights of public safety for the citizens of New York State and it must be declared unconstitutional.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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